APPLICABILITY OF VALUE ADDED TAX TO REAL PROPERTY TRANSACTIONS IN NIGERIA

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The Value Added Tax (Amendment Act), 2007 ("the Act") is the principal legislation which dictates the application of Value Added Tax ("VAT") to certain goods and services in Nigeria. The Act stipulates that VAT shall be chargeable and payable on the supply of all goods and services which are referred to as "taxable goods and services" under the Act, with certain exceptions as listed in the First Schedule to the Act.[1]

The applicability of VAT to the sale of land/property has been a nagging subject of debate between tax authorities and tax consultants on one hand, who insist that property transactions are subject to VAT and, legal consultants on the other hand, who argue that the Act does not contemplate land transactions as being within the ambit of taxable goods and services in Nigeria.

The logical inference that could be drawn from this debate is that VAT is not chargeable in real property transactions as it would appear that real property does not fall within the meaning of goods or services in the English parlance. The conclusion to be drawn upon a perusal of the relevant provisions of the Act may however differ. It will seem therefore that in an attempt to address this debate, recourse may be made to the provisions of the Act, their simple meaning and their practical implications. Hence, the pertinent question; does sale of land/buildings constitute a supply of goods or services under the Act?

As previously noted, VAT is chargeable on those goods and services which are referred to as "taxable" under the Act. Again, it will seem that an easy way out of this muddle would be to determine the definition of "taxable goods and services" under the Act. By the provisions of the Act "taxable goods and services" are those goods and services which are not listed under the 1st Schedule to the Act[2]. At this point, it becomes even more complicated. The 1st Schedule to the Act contains a list of goods and services which are exempt from VAT. Thus, provided a particular good or service is not listed in the 1st Schedule to the Act, it is subject to VAT.

Perhaps, one may extend recourse to the definition of goods in the Blacks' law dictionary[3], which defines goods as;

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1 Section 2 Value Added Tax (Amendment) Act, 2007, LFN
2 Ibid
3 Bryan A Garner, *Black's law Dictionary* (9th Edn) 762

"tangible or moveable property other than money, especially articles of trade or items of merchandise."

A service on the other hand, is defined as;

"an intangible commodity in the form of human effort, skill or labour."

The items listed as exempt goods under Schedule 1[4] are however tangible in nature. The question therefore is whether it can be inferred that reference to goods under the Act is tangible and as such the intention of the drafters could not have been that land as intangible property would fall within the definition of taxable goods.

Property as a taxable good

As previously noted, the Act does not define what a good is and it has been argued that real property or any interest therein, not being a "good", cannot be susceptible to VAT. It is noteworthy also that in defining taxable goods, some have relied on the definition of Section 46 of the Act which defines "taxable persons" as persons carrying out activities, and exploiting "*tangible or intangible property"* for the purpose of generating income. It has thus been argued that if read in conjunction with sections 2 and 3 of the Act[5], the law contemplates that intangible property including interest in real property will be subject to VAT. This however does not settle the debate as it only creates more confusion.

One would assume that as this subject has been debated over a long period of time, a number of judicial pronouncements would have prevailed in providing guidance on this issue. The reverse is however the case. In a recent decision by the Federal High court in the case of **CNOOC Exploration Production V AG Federation (2011)**[6] which although does not entail transfer of title in land, the defendant transferred its rights in an oil mining lease ("OML") to the plaintiff and sought to charge VAT in respect of the sale. The court held that the rights to an OML do not constitute goods under section 2 of the Act because such rights are intangible property which constitutes a chose in action. This same principle it would appear, would have applied assuming the case involved a sale of title in land, being intangible property.

In comparison, the laws on VAT in most jurisdictions are clear, therefore making the applicability of VAT easier to ascertain. Using the UK Value Added Tax Act[7] ("UK VAT Act")) s an example, albeit the tax regime in relation to transfer of interest in property is complex, the law is clear in distinguishing what is taxable from what is not. For instance,

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4 They range from medical products, basic food items, educational materials, amongst others

5 Section 3 of the Act states that the goods and services listed in the First Schedule are exempt from VAT

6 FHC/ABJ/S/665/07

7 Value Added Tax Act, 1994, Chap. 23

the UK VAT Act defines supply of goods to include the *grant, assignment or surrender* of any major interest in land, provided consideration is paid.[8] Thus, the UK VAT Act, taking the possibility of ambiguity in its interpretation into consideration, does not merely define what goods and services are, it specifically defines transfer of interest in land to include a supply of goods, therefore deviating from the usual meaning of the term. Perhaps, lessons could be learnt from the provisions of this law, which goes further to exempt the sale of specific property transactions from value added tax.

Supply of property as a taxable Service

If one cannot reasonably conclude that the transfer of title in land or buildings constitutes a supply of goods, it is pertinent to consider whether it can constitute services within the definition of the Act. Again, the Act does not define the word "services", rather it specifies in the 1st schedule, the list of services which are exempt from VAT. Rationally, however, a title or interest in real property does not constitute a service and it will not be logical to argue that it does.

What could be a plausible argument however is that the activities conducted over the land may constitute a taxable service within the Act. As previously noted, The Black's law dictionary defines service as an intangible commodity in the form of human effort, skill or labour. Thus, where the seller of real property is for instance, a developer, or a real property agent, and is in the business of selling property and applying some human effort or skill to improve the condition of the property, or applying some value of some sort to the land, the courts have held that the service rendered and the amount charged for the service itself is susceptible to VAT. In Momotato v UACN[9] (unreported), the defendant sold a parcel of land to the Plaintiff within its estate and sought to charge VAT. The plaintiff refused to pay the VAT on grounds that the sale of the property does not constitute goods and services under the Act. The court although upholding the contention that sale of land/buildings cannot be held to constitute goods, the development on the land constitute services as the definition of services is generally broad and since the services of development of real estate is not excluded under the exemption list, the services cannot be excluded and are therefore susceptible to VAT.

In spite of the decisions of the court in the above cases, arguments continue to ensue between tax authorities and legal consultants, representing consumers. As expected, revenue generation is of utmost importance to the tax authorities and an attempt to derive revenue through taxation of every single product is inevitable, especially where the law is vague.

8 Paragraph 4, Schedule 4, Value Added Tax Act, 1994, Chap. 23
9 FHC/L/CS/1016/05

In the absence of success of judicial intervention however, it has become expedient for the legislature to address this uncertainty and confusion by making clear, provisions within the Act which are currently ambiguous. Worthy of note is the fact that although the VAT Act was amended in 2007, the ambiguity in the law remains derelict. The amendment of the VAT Act is long over-due to depict a crystal-clear intention of the drafters with respect to what is taxable and what is not. It is expected that this will be done in the nearest future so that participants in the real estate industry who are often caught between the issue of tax evasion for non-remittance of VAT on sale of property and purchasers who are unwilling to pay because in their view "the law does not say so", can rely on precision of the law in taking the right step; for the language of the law, unlike poetry, must be clear and as direct as possible.[10]

[10] Anne Wager and Sophie Cacciaguidi-Fahy, (Ashgate 2008) *Obscurity and Clarity in the law; Prospects and Challenges*, (citing Guide Pour l'élaboration de fédérale)